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12 BANK OF AMERICA, N.A.

13  
14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 SAN FRANCISCO DIVISION

17 CALIFORNIA PACIFIC BANK, a California  
banking corporation,

18 Plaintiff,

19 vs.

20 BANK OF AMERICA, N.A., and DOES 1-20,  
21 inclusive,

22 Defendants.

Case No.: C07-03330 JCS

**BANK OF AMERICA'S NOTICE OF  
MOTION AND MOTION TO DISMISS**

Date: September 21, 2007

Time: 9:30 a.m.

Room: A, 15th Floor

Judge: Joseph C. Spero

23  
24 **TO PLAINTIFF CALIFORNIA PACIFIC BANK, AND ITS COUNSEL OF RECORD:**

25 **PLEASE TAKE NOTICE** that on September 21, 2007, at 9:30 a.m., or as soon  
26 thereafter as this matter may be heard in Court Room A, 15th Floor of the United States District  
27 Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco,  
28 CA 94102, defendant BANK OF AMERICA, N.A. (hereinafter "Bank of America"), will and

1 hereby does move the Court for an order dismissing the Complaint of CAIFORNIA PACIFIC  
2 BANK in its entirety. This motion is brought pursuant to Federal Rule of Civil Procedure  
3 12(b)(6) on the ground that plaintiff has failed to state any claim on which relief may be granted.

4 This motion is based on this Notice of Motion, the Memorandum of Points and  
5 Authorities filed herewith, the Request for Judicial Notice, the Affidavit of Michael Evans, and  
6 the pleadings and records on file in this action.

7 DATED: August 15, 2007

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11 By: /s/ J. Randolph Liebler  
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**I.****SUMMARY OF GROUNDS FOR RELIEF**

The Plaintiff ("California Pacific Bank") has failed to state a claim upon which relief can be granted, because Bank of America was enjoined from honoring any demand for payment of all or any part of its Irrevocable Standby Letter of Credit No. 68017913 ("Letter of Credit") during the commercially reasonable period of time for accepting the documents, pursuant to Article 13(b) of the Uniform Customs and Practice for Documentary Credits 500. (A copy of the Ex Parte Temporary Injunction Order ("Injunction") entered in *Bullard Electronics, LLC v. Bank of America, N.A., and California Pacific Bank*, Case No. 522007CA005147XXCICI (Fla. 6th Judicial Cir. / Pinellas County) is attached to the Request for Judicial Notice as Exhibit "A".)

California Pacific Bank's original draw via SWIFT did not comply with the requirements (including the necessary draw language) under the Letter of Credit. (A copy of all SWIFT messages exchanged between Bank of America and California Pacific Bank from May 29, 2007 through June 1, 2007 are attached to the Affidavit of Michael Evans as Exhibit "B".)

California Pacific Bank's Complaint is an improper attempt to collaterally attack a duly entered temporary injunction against payment on the Letter of Credit.

Even if this Honorable Court chooses not to dismiss California Pacific Bank's alleged claim(s) against Bank of America for the foregoing reasons, this Honorable Court should dismiss or stay these proceedings in the interest of "(w)ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation District, et al. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221 (1952)).

**II.**

**CALIFORNIA PACIFIC BANK FAILS TO STATE A CLAIM UPON WHICH RELIEF  
CAN BE GRANTED AGAINST BANK OF AMERICA**

**A. Chronology of Events**

California Pacific Bank submitted an alleged draw to Bank of America via SWIFT on

1 May 29, 2007; however, California Pacific Bank failed to include the required draw language  
2 which is necessary for payment under the Letter of Credit.

3 It was a principle requirement of the Letter of Credit that California Pacific Bank make  
4 the following certification prior to any disbursement of funds pursuant to the Letter of Credit:

5 "We hereby claim USD \_\_\_\_\_ under your standby letter of  
6 credit no. 68017913 due to Qibee failure to pay indebtedness".

7 (Please see a copy of the original Letter of Credit, which is attached to the Affidavit of Michael E.  
8 Evans as Exhibit "C".)

9 California Pacific Bank's SWIFT message of May 29, 2007 simply stated the principal  
10 amount claimed and the total amount claimed, but lacked the required draw language under the  
11 Letter of Credit. As a result, Bank of America informed California Pacific Bank of the deficiency  
12 via SWIFT message on the morning of June 1, 2007, alerting California Pacific Bank of its failure  
13 to present the beneficiary's statement per the terms and conditions of the Letter of Credit.

14 (Affidavit of Michael E. Evans, Exhibit "B".)

15 On Friday, June 1, 2007 at 3:46 p.m. (PST), California Pacific Bank sent a follow-up  
16 SWIFT message. (Affidavit of Michael E. Evans, Exhibit "B".) The weekend then intervened,  
17 and at 11:00 a.m. (EST) on Monday, June 4, 2007, Circuit Court Judge Mark I. Shames of the  
18 Sixth Judicial Circuit in and for Pinellas County, Florida, issued the Injunction, which prevented  
19 Bank of America from honoring any demand made for payment on the Letter of Credit, until  
20 further order of the Court. The Injunction continues to remain in effect, and no further order of  
21 the Court has issued to date. (Request for Judicial Notice, Exhibit A.)

## 22 **B. Applicable Law & Application Thereof to the Facts**

23 Pursuant to the terms of the Letter of Credit, it is governed by UCP 500, and Article 13(b)  
24 thereof provides as follows:

25 The Issuing Bank, the Confirming Bank, if any, or a Nominated  
26 Bank acting on their behalf, shall each have a reasonable time, not  
27 to exceed seven banking days following the day of receipt of the  
28 documents, to examine the documents and determine whether to  
take up or refuse the documents and to inform the party from which  
it received the documents accordingly.

1 Bank of America had only two hours of banking time after receipt of California Pacific  
2 Bank's alleged draw before the Injunction preventing payment thereon was issued. Once the  
3 Injunction was issued, Bank of America's obligation to act on the draw was suspended. See  
4 *JPMorgan Chase Bank v. Access Healthsource, Inc.*, 225 Fed.Appx. 663, 664 (9th Cir. 2007). As  
5 a matter of law no action for breach of contract or otherwise can be maintained against Bank of  
6 America with respect to the Letter of Credit so long as the Injunction is in effect.

7 Bank of America has at all times relevant hereto been enjoined from payment on the  
8 Letter of Credit, and California Pacific Bank's alleged causes of action fail as a result.

9 **C. California Pacific Bank's Claims Are Not Ripe**

10 Furthermore, California Pacific Bank, which was named a defendant in *Bullard*  
11 *Electronics, LLC v. Bank of America, N.A., and California Pacific Bank*, Case No.  
12 522007CA005147XXCICI (Fla. 6th Judicial Cir. / Pinellas County), and was properly served,  
13 failed to make any appearance to defend that lawsuit. As a result of California Pacific Bank's  
14 failure to defend, a default was taken against California Pacific Bank in that lawsuit on July 9,  
15 2007.

16 California Pacific Bank now improperly attempts to circumvent the Florida lawsuit by  
17 suing Bank of America in California Federal Court on two alleged causes of action. These claims  
18 are not ripe because Bank of America had no choice but to comply with the Injunction in the  
19 Florida lawsuit, and the Injunction was granted well within the reasonable time under UCP 500  
20 for acceptance or refusal with respect to California Pacific Bank's purported draw on Friday, June  
21 1, 2007 at 3:46 p.m. (PST). Because Bank of America's duty to act on the draw was suspended,  
22 California Pacific Bank's claims are not ripe.

23 **III.**

24 **THESE PROCEEDINGS SHOULD BE DISMISSED OR STAYED ON THE BASIS OF**  
25 **THE "WISE JUDICIAL ADMINISTRATION" DOCTRINE**

26 Dismissal or a stay of these proceedings is supported by the "wise judicial administration"  
27 doctrine announced in *Colorado River Water Conservation District v. United States*, 424 U.S.  
28 800, 817-18, 96 S.Ct. 1236, 1246-47, 47 L.Ed.2d 483 (1976). The Colorado River doctrine

1 allows a district court to stay or dismiss a federal suit “due to the presence of a *concurrent* state  
2 proceeding for reasons of wise judicial administration.” *Moses H. Cone Memorial Hosp. v.*  
3 *Mercury Constr. Corp.*, 460 U.S. 1, 15, 103 S.Ct. 927, 936, 74 L.Ed.2d 765 (1983) (emphasis  
4 added) (quoting *Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246); see also *Minucci v. Agrama*,  
5 868 F.2d 1113 (9th Cir. 1989).

6 The *Colorado River* Court announced several factors to determine the appropriateness of  
7 dismissal in the event of concurrent federal-state proceedings, *inter alia*: (1) the inconvenience of  
8 the federal forum, cf. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055  
9 (1947); (2) the desirability of avoiding piecemeal litigation, cf. *Brillhart v. Excess Ins. Co.*, 316  
10 U.S. 491, 495, 62 S.Ct. 1173, 1175, 86 L.Ed. 1620, 1625 (1942); and (3) the order in which  
11 jurisdiction was obtained by the concurrent forums, *Pacific Live Stock Co. v. Oregon Water Bd.*,  
12 241 U.S. 440, 447, 36 S.Ct. 637, 640, 60 L.Ed. 1084, 1096 (1916). The *Colorado River* Court  
13 explained that no single factor is necessarily determinative. Rather, the Court should weigh the  
14 obligation to exercise jurisdiction against the combination of factors favoring restraint. *Colorado*  
15 *River*, 424 U.S. at 818, 96 S.Ct. at 1247.

16 In regards to the instant case, a number of reasons militate against the maintenance of  
17 these proceedings in this forum. First, the Florida state case in Pinellas County, Florida, was  
18 commenced on or about June 4, 2007, whereas this action in the Northern District of California  
19 was not filed by California Pacific Bank until June 25, 2007, nineteen (19) days after California  
20 Pacific Bank was served in the Florida state case. (A copy of the Florida Complaint is attached to  
21 the Request for Judicial Notice as Exhibit “D”.)

22 Additionally, there exists a high likelihood of piecemeal litigation if these federal  
23 proceedings are permitted to continue. As the issuer of the Letter of Credit, Bank of America has  
24 very little information concerning the underlying transaction, which was the basis for the issuance  
25 of the temporary injunction preventing Bank of America’s honor of any demand made for  
26 payment on the Letter of Credit. The fact investigation process in this case would therefore be  
27 rooted in the discovery carried out in the Florida state case, to which California Pacific Bank is a  
28

1 party. California Pacific Bank could attempt to raise its alleged claims against Bank of America  
2 by serving a cross-claim in the Florida case.

3 Finally, the Florida state court has all the interested parties before it, i.e. the original  
4 Applicant (Bullard Electronics, LLC), the Applicant after the April 9, 2007 amendment (NBG,  
5 LLC), the Beneficiary (California Pacific Bank), and the Issuing Bank (Bank of America). As a  
6 result, the issues with respect to the Letter of Credit may more fully be resolved in the Florida  
7 state case.

8 Moreover, since Bank of America was restricted from honoring California Pacific Bank's  
9 draw based upon a valid injunction, Bank of America has a clear defense to California Pacific  
10 Bank's claims in these federal proceedings. *JPMorgan Chase Bank v. Access Healthsource, Inc.*,  
11 225 Fed.Appx. 663, 664 (9th Cir. 2007) (recognizing that an injunction suspends the issuer's  
12 obligation to honor or dishonor the drafts during the pendency of the legal restraint) (quoting  
13 *Kelley v. First Westroads Bank*, 840 F.2d 554, 558 (8th Cir. 1988)); see also *Fanslow v. N. Trust*  
14 *Co.*, 299 Ill.App.3d 21, 233 Ill.Dec. 164, 700 N.E.2d 692, 699 (1998) ("Thus, Northern Trust,  
15 which abided by the injunction, cannot be held liable for 'wrongful' dishonor of Fanslow's draw  
16 documents"). Thus, it would waste judicial resources to allow California Pacific Bank's case to  
17 proceed further in this forum.

#### 18 IV.

#### 19 CONCLUSION

20 WHEREFORE, Bank of America respectfully moves this Honorable Court for an Order  
21 dismissing California Pacific Bank's Complaint. Bank of America further petitions this Court for  
22 any additional relief which is deemed just and reasonable.  
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1 DATED: August 16, 2007

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